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No. 98-1462

IN THE
Supreme Court Of The United States
October Term, 1998

CHARLES EDWARD SWEENEY, JR.,
Petitioner,
v.
STATE OF INDIANA,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Indiana

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Petitioner, after being served with certain federal charges, made statements incriminating under state law as he discussed a plea agreement with federal authorities. He made those statements on advice and in the presence of his counsel, who informed Petitioner of his right against self-incrimination. State authorities prosecuted and ultimately convicted Petitioner in part based on his incriminating statements. Was the presence of counsel under these circumstances an adequate protection for Petitioner's self-incrimination right?

2. Petitioner also was being represented by counsel when he sought immunity from the state for his statements to the federal authorities. The Indiana Supreme Court found it was not the state's intent to give Petitioner use immunity and that there was no immunity agreement under state law. Does Petitioner's alleged belief that such an agreement existed render his incriminating statements involuntary in the face of that state-court finding of fact?

3. A defendant's Sixth Amendment right to "effective" counsel attaches only when the government initiates adversary criminal proceedings against him. When Petitioner made incriminating statements to federal authorities, the state had not charged him with a crime or initiated an adversary judicial proceeding against him. Did Petitioner have a right to effective counsel under the Sixth Amendment with respect to the later-filed state charges when he made those statements to federal authorities?

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REASONS TO DENY THE PETITION

The Court should deny the petition for at least three important reasons. First, Petitioner advances no compelling reason for this Court's review. He asserts merely that the Indiana Supreme Court misapplied properly stated legal rules and misfound facts. Second, Petitioner may bring his claims for first federal review in the lower courts by filing a petition for habeas corpus. Third, the Indiana Supreme Court's decision is correct under this Court's clear precedents.

I. This Court's review of the Indiana Supreme Court's decision would serve no compelling federal interest.

Petitioner does not allege, much less demonstrate, that granting his petition would serve an important federal interest implicating any principle articulated in Rule 10 of this Court's rules. Nor is the state aware of an important federal interest. Petitioner has not alleged that this case involves a novel constitutional question or one about which lower federal and/or state high courts are confused. Neither does Petitioner say the Indiana Supreme Court applied the wrong constitutional standards in his case.

The reasons Petitioner offers in support of his petition are not compelling. Petitioner's first and third reasons are that the Indiana Supreme Court erroneously applied otherwise properly stated constitutional rules governing self-incrimination and ineffective assistance of counsel respectively. *Compare* Pet. at 19-21, 26-29 (alleging violations of *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Strickland v. Washington*, 466 U.S. 668 (1984)), *with* Pet. App. at 33a-35a, 38a-41a (Indiana Supreme Court applying *Miranda* and *Strickland* to Petitioner's claims on direct

appeal). Petitioner's second reason necessarily implies that the Indiana Supreme Court erred — as a factual matter under state law — when it found he lacked a statement protecting use-immunity agreement with the state prosecutor. *See* Pet. at 21-25; Pet. App. at 35a-38a. Thus, Petitioner supports his petition solely with reasons this Court disfavors. *See* SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

II. Petitioner may seek first federal review by habeas corpus.

Petitioner's claims do not warrant this Court's discretionary and discriminating certiorari review. No federal court has ever reviewed them, and there is no special need for this Court to consider at this stage issues more properly reviewed in the first instance by the lower federal courts. Petitioner's more appropriate course, should he continue to desire federal review of the state courts' decisions, is to file a timely habeas-corpus petition that complies with 28 U.S.C. § 2254. Federal habeas review is available to Petitioner because he is in custody on a state-court judgment.

III. The Indiana Supreme Court resolved Petitioner's claims correctly under this Court's precedents.

A. Petitioner's statements leading to his murder conviction were voluntary under *Miranda* because he made them on advice and in the presence of counsel.

Petitioner argues the state violated *Miranda v. Arizona*, 384 U.S. 436 (1966), by prosecuting him in part based on statements he made to federal authorities. Specifically, Petitioner argues his statements should be deemed involuntary because he never was warned they might be used against him in a state prosecution. Pet. at 20.

But *Miranda* warnings are not required formalistically on pain of violating the constitution. *See Michigan v. Tucker*, 417 U.S. 433 (1974) (*Miranda* prescribes recommended procedural safeguards "to provide practical reinforcement for the right against compulsory self-incrimination"). Here, Petitioner needed no warnings from federal or state authorities to assure he understood his right against self-incrimination. When he gave the incriminating statements, Petitioner was cooperating voluntarily with federal authorities on the advice and in the presence of counsel. Pet. App. at 35a. Indeed, as Petitioner revealed his knowledge about the murder victim's whereabouts, he was being represented by two attorneys, who told a state officer they had advised Petitioner of his rights. Pet. App. at 35a.

As this Court held in *Miranda*, the presence of counsel provides "the adequate protective device necessary to make the process of police interrogation conform to the

dictates of the privilege [against self-incrimination]." 384 U.S. at 466; *see also Brady v. United States*, 397 U.S. 742, 754 & n.12 (1970) (counsel's presence may counteract police station's potentially coercive atmosphere) (citing *Miranda*, 384 U.S. at 466). Thus, it is of no constitutional moment that the authorities did not provide the warnings that Petitioner's counsel were there to provide.

The *Miranda* analysis does not change merely because a state officer witnessed the federal authorities' questioning via closed-circuit television. Petitioner was volunteering information to federal authorities and pursuing a plea agreement. Even Petitioner does not say those federal officers were not free to share the fruits of his admissions to state authorities at any time.

Nor, finally, is Petitioner's assertion — rejected as a factual matter by the Indiana courts — that he had a use-immunity agreement with the State even relevant to his right against self-incrimination. Neither the existence of such an agreement nor his attorneys' misimpressions about its existence alter the fact that Petitioner made his statements on the advice of counsel and in their presence.

B. Petitioner has failed to identify a legal justification or compelling reason why this Court should take the extraordinary step of upsetting a factual finding the Indiana Supreme Court made under state law.

Petitioner asserts the state violated his right against self-incrimination by prosecuting him based on statements made after a promise of immunity. But Petitioner's theory — as well as the cases he cites to support it — assumes there

was such a promise. To the contrary, the Indiana Supreme Court found the state promised no such immunity and that, at most, Petitioner mistook the state's intentions. Pet. App. at 35a-36a.

It would be extraordinary in this context for the Court in essence to "overturn" the Indiana Supreme Court's finding of fact. *See Hernandez v. New York*, 500 U.S. 352, 366 (1991) (on direct review of state-court judgment, "in the absence of exceptional circumstances, we would defer to state-court factual findings, even when those findings relate to a constitutional issue"); *cf. Miller v. Fenton*, 474 U.S. 104, 113 (1985) ("an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question"). And there is no good reason for the Court to take such an unusual step. Petitioner argues there was "substantial evidence" that his statements were induced by his lawyers' incorrect belief that a use-immunity agreement existed. But Petitioner's suggested standard is manipulated to require an answer in his favor. Because of the deference owed to the Indiana Supreme Court's fact finding, the proper question is whether that finding — that no use-immunity agreement existed under state law — is so erroneous that it masks a violation of Petitioner's right against self-incrimination. *Hernandez*, 500 U.S. at 366; *cf. Burden v. Zant*, 498 U.S. 433 (1991) (*per curium*) (deferring in habeas review to state court's finding regarding existence of immunity agreement).

The record amply demonstrates the Indiana Supreme Court's finding was reasonable. First, the state prosecutor testified he did not grant Petitioner use-immunity through defense counsel. He merely said he would not prosecute Petitioner if the only evidence he had indicating guilt was Petitioner's own statement. *See* Pet. App. at 37a. Second, it

is undisputed there was no written immunity agreement as required by Indiana statute. *See* IND. CODE § 35-37-3-3 (1998). Third, the immunity agreement Petitioner alleges did not receive at least nominal court approval as Indiana law contemplates. *See* Pet. App. at 36a.

The authority petitioner advances in no way requires a different result. Pet. at 22 (citing *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963)). Those cases merely support the unremarkable proposition that a confession may be deemed coerced, and thus involuntary, where it is induced by a promise of leniency or immunity. They do not hold involuntary all alleged governmental promises of immunity for *represented* suspects. Thus, whatever the source of disagreement over the alleged immunity agreement, Petitioner was represented by counsel, whose presence dissipated "the possibly coercive impact of a promise of leniency." *Brady*, 397 U.S. at 754 (distinguishing *Bram v. United States*, 168 U.S. 532 (1897), where confession was "given by a defendant in custody, alone and unrepresented by counsel").

Nor, finally, is Petitioner's attack on his lawyers' representation with respect to the immunity issue even relevant to the question whether he had an agreement rendering his statements involuntary. For the reasons discussed below, Petitioner had no right to counsel when he made those statements.

C. Petitioner had no Sixth Amendment right to effective counsel when he volunteered the information the state used to prosecute him.

Petitioner claims his counsel were ineffective in not securing a clear and enforceable use-immunity agreement with the state before advising him to make incriminating statements to federal authorities. But the analysis need not even reach the *Strickland v. Washington* test that governs ineffectiveness claims, because Petitioner was not entitled to counsel under the Sixth Amendment at the time he made those statements. *See Wainwright v. Torna*, 455 U.S. 586 (1982) ("Since respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure[.]").

Petitioner was entitled to know about his Fifth Amendment right against self-incrimination during questioning by federal authorities — and he was aware of it then. His two lawyers were present during that questioning. But as this Court's decision in *McNeil v. Wisconsin* teaches, Petitioner conflates his Fifth Amendment right to have counsel present at a custodial interrogation with his Sixth Amendment right to counsel when adversary judicial proceedings begin. *See* 501 U.S. 171 (1991) (rejecting petitioner's attempt to "combine" Fifth and Sixth Amendment rights to counsel).

"The Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings, and before proceedings are initiated a suspect in a criminal investigation has no constitutional right to the assistance of counsel." *Davis v. United States*, 512 U.S. 452, 456-57 (1994)

(citations omitted). *See also United States v. Gouveia*, 467 U.S. 180, 187 (1984) ("our cases have long recognized that the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant"); *id.* at 185 (examples of "formal judicial proceedings" are indictment, information, arraignment, or preliminary hearing). Here, the state had initiated no adversary criminal proceedings against Petitioner when he made his incriminating statements. Petitioner was merely a suspect the state was investigating.

Nor does it matter that Petitioner had *federal* charges pending against him when he made those statements. As the Court stated in *McNeil*, the Sixth Amendment is "offense specific" and "cannot be invoked once for all future prosecutions." 501 U.S. at 175. So the Sixth Amendment's right to assistance of counsel is not implicated by Petitioner's having made incriminating statements with respect to *state* crimes for which he had not been charged. *See id.* at 175-76 (citing *Maine v. Moulton*, 474 U.S. 159, 179-80 (1985), and *Moran v. Burbine*, 475 U.S. 412, 431 (1986)).

CONCLUSION

For these reasons, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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